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Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly, in accordance with Commission on Human Rights Resolution 2005/2, the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Summary

In its previous report to the General Assembly (A/70/330), the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination examined possible linkages between mercenaries and foreign fighters and their impact on human rights and the right of peoples to self-determination. In the present report, the Working Group extends that analysis from a historical perspective, tracing the evolution of the phenomena of mercenarism and foreign fighters and thus allowing for a closer examination of similarities and differences in the motivations, recruitment and regulation of both types of actors. The impacts on human rights and the implications for accountability and remedy are also assessed and compared. In so doing, the Working Group seeks to highlight the common nature of the two sets of actors and to develop new thinking on accountability for violations by foreign fighters that draws upon the experience and regulation of mercenaries and other mercenary-related activity.

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I. Introduction

1. The present report is submitted in accordance with Human Rights Council resolution 30/6 and General Assembly resolution 70/142. The report is linked to the mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, which is, inter alia, to monitor mercenaries and mercenary-related activities in all their forms and manifestations and to identify sources and causes and emerging issues, manifestations and trends regarding mercenaries and mercenary-related activities and their impact on human rights and, in particular, the right of peoples to self-determination.

2. In its previous report to the General Assembly (A/70/330), the Working Group examined possible linkages between the phenomena of mercenaries and foreign fighters and their impact on human rights and the right of peoples to self-determination. In the present report, the Working Group extends that analysis from a historical perspective, tracing the evolution of the phenomena of mercenaries and foreign fighters and thus allowing for a closer examination of similarities and differences in the motivations, recruitment and regulation of both types of actors. The impacts on human rights and the implications for accountability and remedy are also assessed and compared. In so doing, the Working Group seeks to highlight the common nature of the two sets of actors and to develop new thinking on accountability for violations by foreign fighters that draws upon the experience and regulation of mercenaries and mercenary-related activity.

3. The present report covers: (a) the definitions of mercenaries and foreign fighters; (b) the status of mercenaries and foreign fighters in international law; (c) the domestic legal regulation of foreign fighters; (d) the historical evolution of mercenaries and foreign fighters; (e) historical lessons; (f) possible avenues of accountability and remedy for victims of human rights violations; (g) the implications for self-determination; and (h) proposed conclusions and recommendations on how to address the issue of foreign fighters.

4. The Working Group has been conducting its study of foreign fighters since 2014. Activities have included country visits to Tunisia (see A/HRC/33/43/Add.1), Belgium (see A/HRC/33/43/Add.2), Ukraine (see A/HRC/33/43/Add.3) and the European Union (A/HRC/33/43/Add.4), panels of public experts, meetings of experts and the above-mentioned report to the General Assembly.

II. Definitions of mercenaries and foreign fighters

5. Defining mercenaries and foreign fighters is difficult. The legal definition of mercenaries is notoriously hard to apply, and the Working Group has noted that its narrow confines no longer cover the range of mercenary-related activities in the contemporary sphere.[1] Legal definitions of "mercenary" can be found in article 47 of the 1977 Additional Protocol I to the 1949 Geneva Conventions and in the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.[2] Those definitions are lengthy and similar but not identical and contain

[1] See A/70/330, para. 9.

[2] For the definitions set out in those instruments, see the annex to the present report.

a number of cumulative provisions, which make the definitions quite narrow. They can be best summarized as follows: a mercenary is a fighter who is not a member of the armed forces of a State party to a conflict and fights primarily for financial gain. There are significant practical problems relating to the legal definition, which are discussed below.

6. There is no internationally accepted definition of a foreign fighter, but the Working Group has previously provided a working definition: "the term foreign fighter is generally understood to refer to individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict".[3] The Security Council has considered the related phenomenon of foreign terrorist fighters, which it defines as "individuals who travel to a State other than their States of residence for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts, including in connection with armed conflict".[4]

7. At first glance, mercenaries and foreign fighters appear to be similar phenomena. Both fight in wars in States other than their State of origin and may support insurgent groups. The key difference between them, according to their established definitions, is the question of motivation. It is generally accepted both in law[5] and in practice[6] that mercenaries are motivated primarily by financial gain and that foreign fighters are more often motivated by desire to fight for a cause.[7] Differentiating between mercenaries and foreign fighters on the basis of motivation is accurate but creates practical difficulties. Mercenaries can be motivated by money and sympathy with a cause, and foreign fighters are paid in some circumstances.[8]

8. Defining foreign fighters is complicated by the wide range of conflicts in which they can be involved, the tactics that they use and the legitimacy of the organizations that they join. In some cases, foreign fighters have been praised for supporting a cause widely recognized as legitimate, as in the Spanish Civil War. Foreign fighters may be, but are not necessarily, also involved in terrorist activity, a phenomenon that the Security Council has noted with concern.[9]

[3] See A/70/330, para. 13.

[4] See Security Council resolution 2178 (2014).

[5] See the Convention and article 47 of the Additional Protocol.

[6] The deliberations that led to the creation of both the Convention and article 47 of the Additional Protocol focused on the importance of recognizing that the generally accepted definition of a mercenary relied on the notion of financial gain. See Sarah V. Percy, "Mercenaries: strong norm, weak law", *International Organization*, vol. 61, No. 2 (2007).

[7] See Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007).

[8] The problem of legally quantifying motivation bedevilled the creation of the legal instruments relating to mercenaries. See H. C. Burmester, "The recruitment and use of mercenaries in armed conflicts", *American Journal of International Law*, vol. 72, No. 1 (1978); and E. Kwakwa, "The current status of mercenaries in the law of armed conflict", *Hastings International and Comparative Law Review*, vol. 14 (1990).

[9] See resolution 2178 (2014).

III. Status of mercenaries and foreign fighters in international law

Laws applicable to mercenaries

9. Mercenaries are specifically subject to two international legal measures. Article 47 of Additional Protocol I to the Geneva Conventions denies combatant and prisoner-of-war status to mercenaries but does not make mercenarism an offence. The International Convention against the Recruitment, Use, Training and Financing of Mercenaries, on the other hand, makes it an offence to recruit, use, train or finance mercenaries. The Convention has been ratified by 34 States. Additional Protocol I, on the other hand, has 174 State parties,[10] and its provisions on mercenaries are considered to constitute binding customary international humanitarian law in international armed conflict.[11]

10. Article 47 and the Convention both use a cumulative definition of a mercenary. Cumulative definitions contain several criteria that must be met for an individual to be considered a mercenary. Thus, to avoid the legal consequences of the mercenary status applied by each instrument, an individual simply must avoid meeting one of those criteria. Both article 47 and the Convention contain two easily avoided criteria: mercenaries must be paid more than regular soldiers and must not be enrolled in the regular armed forces of the State that hired them. As a result, fighters can avoid the legal consequences of the label just by enrolling in the armed forces or ensuring that on paper they are paid the same or less than regular soldiers. Furthermore, the definition requires that mercenaries take "an active part in hostilities", and private military and security companies have claimed that they have avoided mercenary status by arguing that they do not do so, but rather provide security for people or installations and use force only defensively. Those legal loopholes have rendered both article 47 and the Convention inoperable in practice.

Laws applicable to foreign fighters

11. In contrast, there is no specific international legislation dealing with foreign fighters. The Security Council has adopted two resolutions relating to "foreign terrorist fighters".[12] Foreign terrorist fighters are defined as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".[13] In resolution 2178 (2014), the term "foreign terrorist fighter" is used throughout and the Council calls on States to prevent the movement of such fighters across borders, to share intelligence and, in accordance with their international legal obligations, to deal with the foreign terrorist fighter threat by preventing the radicalization and recruitment of such fighters, preventing such fighters from crossing their borders and devising prosecution and rehabilitation strategies for such fighters who are returning.

[10] See https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument.

[11] The International Committee of the Red Cross asserts that article 47 constitutes a rule of customary international law. See https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule108.

[12] Resolutions 2170 (2014) and 2178 (2014).

[13] See resolution 2178 (2014).

12. In resolution 2170 (2014), the Security Council calls upon States to suppress the flow of foreign terrorist fighters, financing and other support to Islamist extremist groups in Iraq and the Syrian Arab Republic. The resolution otherwise concerns the wider nature of the war in Iraq and the Syrian Arab Republic, in particular the use of terrorism and terrorist acts.

13. Both resolutions thus closely associate terrorism with foreign fighters, but are silent on the use of foreign fighters outside the Syrian context and foreign fighters involved in wars but not in terrorist acts. This leaves out many situations in which foreign fighters operate, but also elides one of the most salient features of a foreign fighter: as Thomas Hegghammer puts it, foreign fighters are "insurgents in every respect but their passports".[14]

Mercenaries, foreign fighters and international humanitarian law

14. As the Working Group noted in its previous report, mercenaries and foreign fighters are, together with all other combatants, required to abide by international humanitarian law.[15] The International Committee of the Red Cross explains that the "principle of equality of belligerents" means that all "parties to an armed conflict have the same rights and obligations under international humanitarian law" and that international humanitarian law "does not aim to determine the legitimacy of the cause pursued by the belligerents".[16] International humanitarian law is deliberately silent on the question of motivation, because it seeks to regulate all armed conflict, not just certain categories of combat.[17] While there is no specific offence of terrorism, terrorist acts, namely, the targeting of civilians in armed conflict, constitute violations of international humanitarian law.[18] The combatant status of foreign fighters is highly complex and varies depending on whether a conflict is international or non-international, among other factors.[19]

15. One of the functions of international humanitarian law is to explain the status of different actors in war. Combatants and non-combatants have different rights and duties in war and are subject to different rules of behaviour. Combatants enjoy a "privilege of belligerency" that exempts them from the operation of domestic law for engaging in hostilities permitted by the law of armed conflict. Non-combatants, however, enjoy no such privilege and may be prosecuted for such conduct under domestic law. All combatants are also entitled to appropriate treatment as prisoners of war. Accordingly, the determination of combatant status is crucial.

16. Individuals meeting the international legal definition of a mercenary are automatically deemed not to be combatants, losing both combatant privileges and the right to prisoner-of-war status.

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[14] See Thomas Hegghammer, "The rise of Muslim foreign fighters: Islam and the globalization of jihad", *International Security*, vol. 35, No. 3 (2010), p. 55.

[15] For further information on private military and security companies and abiding by international humanitarian law, see https://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.htm.

[16] See https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism.

[17] See Sandra Kraehenmann, "Foreign fighters under international law", in *Academy Briefing* No. 7 (Geneva Academy of International Humanitarian Law and Rights, 2014), p. 23.

[18] Ibid., p. 24.

[19] For a detailed discussion, see Sandra Kraehenmann, "Foreign fighters under international law", in *Academy Briefing* No. 7 (Geneva Academy of International Humanitarian Law and Rights, 2014).

IV. Domestic legal regulation of foreign fighters

17. A number of States have promulgated domestic provisions that relate to citizens undertaking military service abroad. There are five types of domestic controls applicable to foreign fighters: nineteenth-century foreign enlistment legislation; newly created specific foreign fighter legislation; controls relating to the removal of citizenship; controls restricting movement or allowing for the confiscation of passports; and other anti-terror provisions.

A. Nineteenth-century foreign enlistment legislation and neutrality

18. A number of domestic laws adopted in the late nineteenth and early twentieth centuries addressed foreign enlistment. Those laws were enacted as part of a developing concept of neutrality in the international system. States wishing to remain neutral in foreign wars were concerned that the foreign enlistment of a citizen or citizens might embroil them in unwanted conflicts.[20] Such laws were usually called foreign enlistment acts. They prevented the enlistment of citizens in foreign armies, and often also prevented the recruitment on home soil of soldiers destined for wars abroad. They were not designed specifically to deal with mercenaries, and by the 1930s, 45 of the 66 recognized States in the international system had enacted such laws.[21] Many remain on the books.

19. However, those acts have been characterized by their non-use since the beginning of the twentieth century.[22] Foreign enlistment legislation was overtaken by events. First, the law of neutrality was quickly altered, and by the time neutrality was codified in article 6 of the Hague Convention V of 1907, it specifically excluded "the fact of persons crossing the frontier separately to offer their services to one of the belligerents".[23] Second, the acts faced challenges in terms of volunteers enlisting in the wars of the early twentieth century. During the First World War, the United States of America, despite its official neutrality, was disinclined to penalize Americans enrolled in the British military forces, in part because of changes to the law of neutrality in the Hague Conventions; the mere fact of foreign enlistment no longer constituted a violation of neutrality.[24] Likewise,

[20] See Janice E. Thomson, *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press, 1994).

[21] Ibid.

[22] The United States has not enforced its neutrality legislation since the turn of the twentieth century. See Jules Lobel, "The rise and decline of the Neutrality Act: sovereignty and congressional war powers in United States foreign policy", *Harvard International Law Journal*, vol. 24 (1983); and Juan Carlos Zarate, "The emergence of a new dog of war: private international security companies, international law and the new world disorder", *Stanford Journal of International Law*, vol. 34, winter (1998), p. 136. The Diplock Report discusses the British case: Lord Diplock, Derek Walker-Smith and Geoffrey de Freitas, "Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries" (London, Stationery Office, 1976).

[23] See Ian Brownlie, "Volunteers and the law of war and neutrality", *International and Comparative Law Quarterly*, vol. 5, No. 4 (1956), p. 570. For the text of the Convention, see https://www.icrc.org/ihl/INTRO/200?OpenDocument.

[24] See David Riesman, "Legislative restrictions on foreign enlistment and travel," *Columbia Law Review*, vol. 40, No. 5 (1940); and H. C. Burmester, "The recruitment and use of mercenaries in armed conflicts", *American Journal of International Law*, vol. 72, No. 1 (1978).

while the United Kingdom attempted to reinvigorate its act in 1937 to deal with volunteers in the Spanish Civil War, the act proved "embarrassingly unenforceable" owing to problems relating to evidence and the act's applicability to the conflict; it was not used.[25] The Diplock Report, ordered by the Government of the United Kingdom of Great Britain and Northern Ireland after British mercenaries had been captured, tried and executed in Angola in 1976, stated that the act was unenforceable because of the considerable changes in warfare since the nineteenth century and that it should be repealed.[26]

B. New legislation focusing specifically on foreign fighters

20. Among those States seeking to control foreign terrorist fighters or fighters travelling to Iraq or the Syrian Arab Republic, Australia has taken one of the most specific approaches. While most other States rely on existing anti-terror instruments to regulate foreign fighters, Australia has adopted legislation specifically against foreign fighters, perhaps owing to the Crime (Foreign Incursions and Recruitment) Act 1978, initially designed to distinguish between foreign fighters and dual-nationality Australians performing compulsory military service in the armed forces of the country of their other nationality.[27] It has been superseded by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014, created specifically to deal with Australians travelling to Iraq or the Syrian Arab Republic and returning with heightened military skills.[28] The Act creates a "declared area" offence whereby it is prohibited to enter a particular area where a listed terrorist organization is engaged in hostile activity.[29] It is acceptable to visit a declared area for only three reasons: providing humanitarian aid, making news reports in a professional capacity and making bona fide visits to family members.[30]

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[25] See S. P. Mackenzie, "The Foreign Enlistment Act and the Spanish Civil War, 1936-1939", *Twentieth Century British History*, vol. 10, No. 1 (1999), p. 52. There were a number of difficulties surrounding the application of the Act to the situation in Spain. The wording of the Act seemed to require that (a) Britain be at peace with both sides, and (b) each contender be a de facto foreign State; it was not clear that this was the case in Spain. Moreover, the chance of successful prosecution should the Act apply was deemed to be low for those reasons and also because proof of an offence would be hard to establish. Ibid., pp. 55 and 60.

[26] See Lord Diplock, Derek Walker-Smith and Geoffrey de Freitas, "Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries" (London, Stationery Office, 1976), p. 7.

[27] See http://www.theage.com.au/comment/australian-law-helps-keep-assad-in-power-20130505-2j11y.html.

[28] See George Williams and Keiran Hardy, "National security (part two): national security reforms stage two: foreign fighters", *Law Society of New South Wales Journal*, vol. 7 (2014). See also https://www.legislation.gov.au/Details/C2014A00116.

[29] One of the notable challenges to this law has been its applicability to Australians travelling to declared areas to fight against Islamic State in Iraq and the Levant (ISIS), some of whom have not been charged. See https://www.thesaturdaypaper.com.au/news/politics/2015/12/12/the-law-and-australian-anti-daesh-fighter-ashley-dyball/14498388002740.

[30] See Keiran Hardy and George Williams, "Australian legal responses to foreign fighters", *Criminal Law Journal* (forthcoming). Hardy and Williams note that there may be other legitimate reasons for visiting a declared area that remain excluded by the legislation.

C. Removal of citizenship

21. A number of States have explored the removal of citizenship as a way to ensure that foreign terrorist fighters will find it difficult to return to their home State. Those efforts have applied mainly to dual citizens, in order to avoid statelessness.

22. Australia adopted the Australian Citizenship Amendment (Allegiance to Australia) Bill in 2015. The Bill provides for the removal of citizenship from Australians with dual nationality for a number of terrorism offences as well as for foreign military service (in the armed forces of a country at war with Australia or a declared terrorist organization).

23. In 2014, the Government of Canada introduced legislation that would remove the citizenship of dual-nationality citizens and naturalized citizens owing to a variety of situations, including conviction for terrorism offences, both in Canada and abroad.[31] As of 2016, the Government has begun the process of repealing the legislation.[32]

24. In addition, the United Kingdom attempted to include, in its Counter-Terrorism and Security Act 2015, measures that would remove citizenship from citizens who were suspected of committing terrorist offences while fighting in Iraq or the Syrian Arab Republic, but those plans were halted amid concerns about statelessness.[33] However, the Immigration Act 2014 gave the Secretary of State a reviewable power to take British citizenship from citizens if they had behaved in a manner that was "seriously prejudicial to the vital interests of the United Kingdom" and if there were reasonable grounds to assume that they could achieve citizenship elsewhere.[34]

D. Confiscation of passports

25. A number of States have enacted legislation that allows for the confiscation of the passports of those declared to be a security risk,[35] which applies to terrorist activity or training abroad as well as fighting in hostilities abroad. The Counter-Terrorism and Security Act 2015 of the United Kingdom curtails travel to "locations which facilitate terrorist networking, training and experiences which provide individuals with enhanced capabilities on their return".[36] Lucia Zedner identifies similar passport removal provisions in Belgium, Denmark, Germany and the Netherlands.[37]

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[31] Bill C-24, An Act to Amend the Citizenship Act and to Make Consequential Amendments to other Acts; see http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6684615. For analysis, see http://www.cbc.ca/news/politics/new-citizenship-act-allowing-revocation-of-canadian-citizenship-takes-effect-1.3093333.

[32] See http://www.cbc.ca/news/politics/john-mccallum-citizenship-act-repeal-bill-1.3463471.

[33] See http://www.theguardian.com/politics/2014/sep/01/anti-terror-policy-legal-political-opposition-jihadis-uk.

[34] See David Anderson, "Citizenship removal resulting in statelessness". At the time of reporting, the Secretary had not exercised this power.

[35] See Lucia Zedner, "Citizenship deprivation, security and human rights," *European Journal of Migration and Law*, vol. 18, No. 2 (2016), p. 226.

[36] Ibid., p. 227.

[37] Ibid., p. 30.

26. State practice has tended to address foreign fighters through the enforcement of anti-terror legislation. A number of States and regional governments have enacted legislation that limits government benefits for individuals suspected of terrorist activity, including individuals fighting in foreign conflicts.[38] Belgium, Canada, Denmark, France, the Netherlands, Spain and the United States can charge foreign fighters with various offences relating specifically to terrorism but do not criminalize travel to a declared area or specifically target the act of foreign fighting.[39]

V. Historical evolution of mercenaries and foreign fighters

27. Examining the history and evolution of foreign fighters and mercenaries in conjunction provides important background for comparing and contrasting the two phenomena.

A. Prior to the nineteenth century

1. Mercenaries

28. Mercenaries have a particularly long history, stretching back to the classical world,[40] and their use in European wars was commonplace from the medieval period until the mid-nineteenth century. Throughout that time, the distinguishing feature of a mercenary was financial motivation, as nationality did not become a differentiating feature before the sixteenth century.[41]

29. Mercenaries in medieval Europe fought as loosely organized bands, usually centring on an individual captain. While they were not contracted to a lord, king or other hiring agent, they were famous for raiding and pillaging the countryside in order to survive.[42] Perhaps the most well-known mercenaries during this period were the *condottieri* of the Italian city-states. The *condottieri* often extorted money from city-states in exchange for not attacking, and extortion, combined with exorbitant fees, was responsible for the decline of Siena as a major force on the Italian peninsula.[43]

30. Eventually, States brought mercenaries under control. The decision to do so was a matter of capacity (States had to be able to raise and administer a standing army), ethics (mercenaries, because they fought for money, had long been

[38] The present report cites similar practices in Belgium and the Netherlands.

[39] See Lorenzo Vidino, "Foreign fighters: an overview of responses in 11 countries" (Zurich, Switzerland, Centre for Security Studies, Swiss Federal Institute of Technology, 2014).

[40] See James Larry Taulbee, "Mercenaries and citizens: a comparison of the armies of Carthage and Rome", *Small Wars and Insurgencies*, vol. 9, No. 3 (1998); and Guy Thompson Griffith, *The Mercenaries of the Hellenistic World* (Cambridge University Press, 2014).

[41] See Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007).

[42] See Kenneth A. Fowler, *Medieval Mercenaries, vol. 1: The Great Companies* (Oxford, Blackwell Publishers, 2001).

[43] See William Caferro, "Mercenaries and military expenditure: the costs of undeclared warfare in XIVth-century Siena," *Journal of European Economic History*, vol. 23, No. 2 (1994), and *Mercenary Companies and the Decline of Siena* (Baltimore, Johns Hopkins University Press, 1998).

considered to be unethical) and necessity (mercenaries caused significant trouble when they were not employed).[44] Mercenaries did not disappear, but the business became a State-to-State trade whereby leaders could negotiate with others to hire foreigners to fight.

31. From the sixteenth century onward, mercenaries were hired on the basis of treaties or contracts between States. Examples of this type of mercenary included the Swiss Guard serving in the Vatican, the use of Swiss mercenaries in France[45] and the British recruitment of German mercenaries to fight throughout the eighteenth and nineteenth centuries, most notably in the American Revolution.[46]

2. Foreign fighters

32. Foreign fighters are a comparatively more recent phenomenon. The notion of a volunteer fighting for a foreign cause applies historically only in a situation in which armies were organized along national lines and the use of foreigners in those armies had thus become noticeable. Accordingly, foreign fighters appeared in the first mass revolutionary movements, beginning with the American and French revolutions and continuing in various rebellions and revolutions throughout both Europe and the Americas until the end of the nineteenth century.

33. Mercenaries and foreign fighters were mirror images of each other during this period. The rise of the notion of nationality played a crucial role in both cases. While mercenaries had always been defined by their financial motivation, their foreign status became particularly objectionable in the context of a war fought by citizens. Both American and French revolutionaries explicitly stated their dislike of and discomfort with mercenaries.[47]

34. Distinguishing the different motivations of the two types of fighters is crucial to understanding differences in the manner in which they were recruited and the nature of the conflicts in which they fought.

35. Mercenaries and foreign fighters fought in different types of conflicts and, crucially, in different types of armed forces. The transformation of the mercenary business into a State-to-State trade, which was complete by the end of the sixteenth century, meant that mercenaries were not used by insurgent groups during this period. Mercenaries were expensive, and their recruitment required the permission of the State from which they were sourced. The reluctance of German principalities to authorize mercenaries to fight in rebellions or revolutions is understandable. Mercenaries were expensive resources used by status quo Powers to bolster their position and to fight in inter-State wars or suppress rebellions. They were professional soldiers recruited into the regular armed forces of the State.

36. Conversely, foreign fighters both volunteered and were specifically recruited on the basis of revolutionary sympathy. Successful revolutionaries often moved

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[44] See Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007).

[45] See John McCormack, *One Million Mercenaries: Swiss Soldiers in the Armies of the World* (London, Leo Cooper, 1993).

[46] See Rodney Atwood, *The Hessians: Mercenaries from Hessen-Kassel in the American Revolution* (Cambridge University Press, 1980).

[47] See Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007), chap. 5.

from revolution to revolution. The general Tadeusz Kościuszko fought in Polish rebellions against Russia and on the American side during the Revolution. The American revolutionaries vigorously sought to recruit fighters. Foreign fighters were both experienced and inexperienced and fought in insurgencies and rebellions in armies that were often poorly organized.

37. Foreign fighters and mercenaries, accordingly, were recruited in very different ways. The State-to-State trade in mercenaries used various systems but generally relied on pre-existing arrangements between rulers, such as the agreements facilitating the hiring of mercenaries from Hesse and Hanover by the British crown.[48] Sometimes, States were given permission to recruit mercenaries within a particular principality. In contrast, foreign fighters were recruited on the basis of enthusiasm for a cause, and often because of pre-existing links between individuals, consisting of either shared ideas or shared ethnicity.[49]

B. From the early twentieth century until the wars of decolonization

38. The history of mercenaries and foreign fighters took a different turn after the beginning of the nineteenth century. During the period from approximately 1900 until the wars associated with decolonization began in the 1960s, war became a highly directed State activity involving the mass mobilization of national soldiers on the basis of duty to the State, often expressed in highly patriotic terms. In that context, both mercenaries and foreign fighters saw their activities transformed.

39. The use of mercenaries fell out of favour in the mid-nineteenth century, after Britain had experienced difficulties in hiring them for the war in the Crimea.[50] The subsequent development of effective conscription based on nationalism throughout Europe meant that the use of mercenaries largely disappeared: supplying States no longer wished to send their citizens abroad to fight, and hiring States ceased the practice.[51]

40. Foreign fighters were also affected by the rise of nationalism. During this period, there were two kinds of foreign fighters. Nationals of States affected by the two world wars often formed subsets of national armies, such as the Polish and Ukrainian Legions in the First World War, fighting for an independent State alongside the Austro-Hungarian army,[52] or the Free Poles or Free French in the Second World War, who were used to support the wider war effort, including as substitutes for the military forces rendered inactive by German occupation.

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[48] See Rodney Atwood, *The Hessians: Mercenaries from Hessen-Kassel in the American Revolution* (Cambridge University Press, 1980); and Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007).

[49] See David Malet, "Why foreign fighters?: historical perspectives and solutions", *Orbis*, vol. 54, No. 1 (2010), p. 101.

[50] See Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007); and C.C. Bayley, *Mercenaries for the Crimea: The German, Swiss and Italian Legions in British Service, 1854-1856* (London, McGill-Queen's University Press).

[51] See Janice E. Thomson, "State practices, international norms and the decline of mercenarism", *International Studies Quarterly*, vol. 34; and Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007).

[52] See Marcello Flores, "Foreign fighters involvement in national and international wars: a historical survey", in *Foreign Fighters under International Law and Beyond*, ed. Andrea de Guttry, Francesca Capone and Christophe Paulussen (Springer, 2016).

41. The Spanish Civil War constituted the most significant use of foreign fighters during this period. Approximately 40,000 fighters joined what came to be known as the International Brigades in the fight against fascism. At the time, the Brigades were regarded with some suspicion, in particular upon their return. Brigade fighters from Canada and the United States were barred from holding public office because of their association with communism. The Nationalist side also recruited approximately 1,000 volunteers.[53] The Spanish Civil war more closely resembled the insurgencies and rebellions of the pre-nineteenth-century period than it did the quasi-State support provided to foreign fighters during the two world wars.

C. From the wars of decolonization until the present

42. During the period from the 1960s to the end of the cold war, the use of foreign fighters remained largely unchanged, whereas the use of mercenaries saw a resurgence in a different form. Foreign fighters were active mainly in association with resistance movements, including in Afghanistan, where they were recruited to resist Soviet forces. Their numbers were small until 1984, when a deliberate religious effort was made to recruit Muslims to resist secularizing communism.[54] The use of foreign fighters in Afghanistan marked the beginning of a period in which most foreign fighters are religiously motivated Muslims and which has continued from the end of the cold war to the present. In particular, Islamic foreign fighters have fought in Kosovo;[55] Bosnia and Herzegovina;[56] Chechnya, Russian Federation;[57] Afghanistan;[58] and Iraq,[59] and are now fighting in the Syrian Arab Republic.[60]

43. The use of mercenaries changed significantly during decolonization, when the idea of hiring soldiers was brought back to life, although in a form that more closely resembled the use of mercenaries in the pre-seventeenth-century period. Mercenaries were hired to fight in the wars that followed decolonization in Africa, both by colonial interests seeking to stay in power, as in the case of the Congo in the 1960s,[61] and by secessionist groups, as in the conflict in Biafra (1967-1970)[62] and in

[53] See David Malet, "Why foreign fighters?: historical perspectives and solutions", *Orbis*, vol. 54, No. 1 (2010), p. 104.

[54] Ibid., p. 105.

[55] Any reference to Kosovo, whether to the territory, institutions or population, is to be understood in full compliance with Security Council resolution 1244 (1999) and without prejudice to the status of Kosovo.

[56] See E/CN.4/1995/29.

[57] See Cerwyn Moore and Paul Tumelty, "Foreign fighters and the case of Chechnya: a critical assessment", *Studies in Conflict and Terrorism*, vol. 31, No. 5 (2008).

[58] See E/CN.4/2004/15; and David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford University Press, 2013), chap. 6.

[59] See Joseph Felter and Brian Fishman, "Al-Qaida's foreign fighters in Iraq: a first look at the Sinjar records" (Defence Technical Information Centre, 2007).

[60] See A/70/330.

[61] See Anthony Mockler, *The Mercenaries* (London, Macdonald).

[62] See John de St. Jorre, *The Nigerian Civil War* (London, Hodder and Stoughton); and Anthony Mockler, *The Mercenaries* (London, Macdonald).

civil wars, including that in Angola,[63] and to carry out coups, as in Benin, the Comoros and Seychelles.[64]

44. During the decolonization period, mercenaries closely resembled those of the pre-seventeenth-century era. They were loosely organized bands of fighters, often centring on an entrepreneurial individual. These arrangements were purely commercial. The mercenaries were not known for their military effectiveness,[65] but became of concern to the international community because of their impact on newly decolonized States. By the end of the 1980s, as the wars that surrounded decolonization began to subside, the use of this type of mercenary was no longer common.

45. Concerns about mercenarism appeared after the cold war in a new form: the private military company. These companies were tightly organized groups of fighters, operating under a corporate structure who stated that they would fight only for sovereign States. The best known of these companies were Executive Outcomes (active in Angola and Sierra Leone) and Sandline International (active in Papua New Guinea and Sierra Leone). They were substantially more effective than their predecessors in the 1960s and 1970s, and they significantly influenced the conflicts in which they fought. Companies of this type faced significant international disapproval and, by the end of the 1990s, recognized that they could not stay in business in the same form.[66]

46. The 2003 military intervention in Iraq provided an opportunity for the private military and security industry to take a new, less controversial form. Many of the same players that had been involved in the private military company industry of the 1990s formed new private security companies to support the United States-led intervention. These new companies were engaged primarily by States but explicitly claimed that they avoided combat by using force only defensively; their relationship with State military forces and their argument that they did not engage in active combat allowed them to skirt the legal definition of a mercenary.[67]

47. Both the private military and security companies of the type that were used in the 1990s in Iraq and those of the type that have been used since have restricted their services to sovereign States. Indeed, with the decline of foreign involvement in Afghanistan and Iraq, the market for their services has become extremely limited and the industry has seen considerable restructuring, with firms going out of business.[68] These companies differ considerably from foreign fighters, who have been engaged with non-State insurgencies and do not claim that they abide by international law.

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[63] See George H. Lockwood, "Report on the trial of mercenaries: Luanda, Angola, June 1976", *Manitoba Law Journal*, vol. 7; and Gerry Thomas, *Mercenary Troops in Modern Africa* (Boulder, Colorado, Westview Press).

[64] See Anthony Mockler, *The New Mercenaries: The History of the Hired Soldier from the Congo to the Seychelles* (London, Sidgwick and Jackson, 1985).

[65] See Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007).

[66] Ibid., chap. 7.

[67] Ibid.

[68] See Sarah Percy, "Regulating the private security industry: a story of regulating the last war", *International Review of the Red Cross*, vol. 94, No. 887.

48. Previous reports of the Working Group[69] outlined most of the contemporary activity of foreign fighters. Since the 1990s, foreign fighters have been involved, on a primarily religious basis, in conflicts in Kosovo; Chechnya, Russian Federation; Afghanistan; Iraq; and the Syrian Arab Republic. The organization Islamic State of Iraq and the Levant (ISIL) has notoriously recruited foreign fighters to support its efforts. David Malet points out that across time, the mobilization of communities of foreign fighters has relied on the existence of a transnational community with a particularly salient identity, and on the capacity of the group to communicate and travel.[70]

VI. Historical lessons: recruitment, regulation and the implications of motivation

49. The joint history of mercenaries and foreign fighters reveals that changes in the way in which war is fought had a significant impact on both types of actors. As war shifted and became a more State-based activity, the types of roles played by mercenaries and foreign fighters also shifted. However, it is generally true that foreign fighters have been associated primarily with rebellion, revolution and insurgency and that mercenaries have been hired predominantly by States. The historical evolution of mercenaries and foreign fighters calls for a closer examination of similarities and differences in the motivation, recruitment and regulation of both types of actors.

A. Recruitment

50. Mercenaries and foreign fighters share superficial similarities in terms of recruitment. In the Angolan war of the mid-1970s, mercenaries were recruited by means of advertisements in British newspapers, a tactic that does not seem very dissimilar from the use of social media to recruit foreign fighters today. However, the Angolan method of recruitment has been a notable exception to the general practice of mercenary recruitment. Mercenaries have been of value historically because they have brought with them specialist skills and training; this has been especially true since the 1960s. As a result, the dominant mode of the recruitment of mercenaries, and also of private military and security companies, has been personal contacts and networks, which often rely on previous service experience.

51. Before the seventeenth century, mercenary leaders would hire people whom they knew and had fought alongside; since the twentieth century, the case has been much the same. During the period of the State-to-State trade in mercenaries, mercenaries were often trained deliberately to become part of a force that could work under contracts abroad. As the industry has become more professionalized, the ability to recruit experienced and effective personnel has been a competitive advantage. Even today's companies are more likely to recruit through personal contacts than in any other way, and most do not maintain large numbers of full-time employees. It is a contract business in which specific people are recruited for a

[69] A/70/330 and A/69/338.

[70] See David Malet, "Why foreign fighters?: historical perspectives and solutions", *Orbis* 54, No. 1 (2010), p. 107.

specific job.[71] Mercenaries and private military and security company employees have been valuable because of their previous military experience and expertise. They have often been used as what would today be called "force multipliers", because their high level of skill means that small numbers of mercenaries can have a considerable impact.

52. Foreign fighters have been recruited on the basis of personal networks and the widespread use of media. David Malet argues that the recruitment of foreign fighters has followed a standard model throughout history, with four stages. First, insurgencies (typically the weaker side) seek external support; second, to gain such support they target outsiders who share their cause; third, of those outsiders, the most susceptible to recruitment are those who are highly active in the community in question but are otherwise marginalized in the wider community; and fourth, the recruiters then emphasize the existential threat posed to the common group.[72]

53. Recruitment has relied heavily on the use of media as well as on personal contacts. In the past, these may have taken the form of contacts with returning fighters or the use of pamphlets and letters. During the contemporary period, recruitment has relied heavily on social media and personal contacts, both online and in person.[73]

B. Control

54. Both mercenaries and foreign fighters have prompted significant regulation efforts throughout their history. There have been two waves of control over mercenaries in the past. First, as States became more powerful, they were able to end the entrepreneurial system of mercenary activity, which was necessary in part because unemployed mercenaries posed a significant security challenge. Second, States stopped the State-to-State trade in mercenaries when their employment became incompatible with changing norms and rules. In the late eighteenth and early nineteenth centuries, the development of conscription and the notion of citizen military service made it harder to justify the use of foreign soldiers,[74] and the development of neutrality law made States concerned that mercenaries could draw them into conflicts in which they hoped to remain neutral.[75]

55. Efforts to control mercenaries during the twentieth century and private military and security companies in the early twenty-first century have followed a similar pattern: concerns about neutrality, the challenge to the norm of national self-determination, and the security challenges posed by the use of force by non-State actors have prompted State control. The problems caused by mercenaries in the wars of decolonization have led to a number of attempts to control them. The General

[71] See Sarah Percy, "The changing character of private force", in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford University Press, 2011).

[72] See David Malet, "Why foreign fighters?: historical perspectives and solutions", *Orbis* 54, No. 1 (2010), p. 100.

[73] See Jytte Klausen, "Tweeting the jihad: social media networks of Western foreign fighters in Syria and Iraq", *Studies in Conflict and Terrorism*, vol. 38, No. 1 (2015).

[74] See Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007).

[75] See Janice E. Thomson, *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press, 1994).

Assembly and the Security Council have both condemned the use of mercenaries.[76] States developed both article 47 and the Convention to deal with the mercenary issue.

56. Individual States have also grappled with mercenaries. One of the most useful examples of the regulation of citizens who had become involved in foreign conflicts occurred in the United Kingdom. The United Kingdom was prompted to act when a number of mercenaries who had been recruited predominantly in that country were captured and tried in Angola in 1976. Four were ultimately executed, including three United Kingdom nationals. Concern as to whether the actions of United Kingdom citizens abroad could entangle the Government of the United Kingdom in unwanted situations prompted the Diplock Inquiry. The report resulting from that inquiry[77] considered a wide range of issues relating to foreign military service, in particular the idea that under some circumstances (specifically, the Spanish Civil War) foreign military service was acceptable and in other cases it was not.[78]

57. The Diplock Report also considered the practicalities of preventing individuals from taking up arms in foreign conflicts. It concluded that effectively preventing foreign military service posed many difficulties, some of which could be insurmountable. The Report identified several areas of particular difficulty: first, how to prevent individuals from leaving the country; second, the outdated nature of the Foreign Enlistment Act; and third, the problems created by motivation and the fact that some foreign service might be acceptable. All three of those challenges are examined in depth below.

58. The Diplock Report noted that there were particular difficulties associated with preventing putative mercenaries from leaving the country. One preventive measure would be to remove the passports of mercenaries, but the Report noted that there would be numerous difficulties associated with doing so and concluded that "neither the refusal of a passport nor its withdrawal can provide an effective administrative means of preventing or delaying the departure from the country of a would-be mercenary".[79]

59. The Diplock Report also considered the efficacy of the Foreign Enlistment Act. The Act was established in 1870, at about the same time as many States were implementing such legislation. The Report concluded that the Foreign Enlistment Act was likely unenforceable, given the changes in war since the 1870s; that it was not applicable to service with non-State forces; and that it was difficult to prove what an accused fighter had actually done while abroad. The latter point, the authors

[76] See Sarah Percy, "The United Nations Security Council and the use of private force", in *The United Nations Security Council and War*, ed. Vaughan Lowe et al. (Oxford University Press).

[77] Lord Diplock, Derek Walker-Smith and Geoffrey de Freitas, "Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries" (London, Stationery Office, 1976).

[78] See Geraint Hughes, "Soldiers of misfortune: the Angolan civil war, the British mercenary intervention and United Kingdom policy towards southern Africa, 1975-6," *The International History Review*, vol. 36, No. 3.

[79] See Lord Diplock, Derek Walker-Smith and Geoffrey de Freitas, "Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries" (London, Stationery Office, 1976), p. 6. The Report noted that there were a number of other challenges related to passports, but also that they were no longer of concern as a result of new, technologically sophisticated passport and immigration controls.

also concluded, was the likely reason that the Act had never been used at the time of their writing.[80]

60. The Diplock Report also considered whether to develop new, more effective legislation, pertaining only to mercenaries,[81] and concluded that that was not desirable, because of the difficulties of establishing a mercenary's motives to a standard that could result in successful prosecution. The authors did not believe that it could "be justified on grounds of public interest to impose a general prohibition on United Kingdom citizens from serving in some capacity or other (e.g., as instructor or technician) in the armed forces of a friendly State at a time when there are no hostilities in which that force is engaged".[82]

61. Modern domestic legislation restricting foreign service is in some ways more feasible, owing to better passport technology and control and because modern legislation is more specific. For example, in Australia such legislation applies to a "declared area",[83] and in the United Kingdom it specifies the activity by applying consequences to individuals suspected of participating in or abetting terrorism.[84]

C. Implications of differing motivations for regulation

62. Differing motivations mean that mercenaries and foreign fighters pose different challenges to control. Mercenaries, because they fight primarily for financial gain, can in theory fight in any conflict for which a party to armed conflict is willing to hire them, and at any time. Foreign fighters, because they fight for a particular cause, have been much more specific in their destinations. In contrast, the specific motivations of foreign fighters has meant that they have specific destinations, making regulation easier in practical terms, as people declaring an interest in certain destinations would be suspect.

63. The differing motivations of foreign fighters and mercenaries have resulted in different patterns of employment. Because mercenaries work for money, they have generally been the tools of the wealthy, and therefore usually of the powerful. Because foreign fighters are recruited for ideological or religious reasons, they have usually served the less powerful. The majority of the history of mercenaries demonstrates that mercenaries have worked mainly for States and more rarely for insurgent groups.

64. Moreover, countering financial motivations may well be easier than countering ideological or religious ones. If mercenaries are not paid, they will not fight; therefore, disrupting the ability to pay would be a logical policy solution should the use of mercenaries again become widespread and problematic. This tool would not be as effective against foreign fighters. In fact, the motivation of foreign fighters poses a particular challenge: efforts to control foreign fighters through domestic

[80] Ibid., pp. 9 and 10. The Foreign Enlistment Act has never been used to date.

[81] The restriction to mercenaries is interesting and demonstrates the relative absence of other types of foreign fighting as a policy problem in the United Kingdom at this time.

[82] See Lord Diplock, Derek Walker-Smith and Geoffrey de Freitas, "Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries" (London, Stationery Office, 1976), pp. 11 and 12.

[83] The Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Australia) is discussed further below.

[84] See Counter-Terrorism and Security Act 2015.

legislation and policies may backfire if they are perceived as draconian and out of step with local communities.[85]

65. There is evidence of both mercenaries and foreign fighters moving from conflict to conflict, as was the case when revolutionaries moved between the American colonies and France during the American and French Revolutions and later during the revolutions of 1848; in the twentieth century, *mujahideen* fighters fought in Kosovo, Afghanistan and Iraq. Similarly, mercenaries move from conflict to conflict. Many generals in the pre- and post-Napoleonic period served in multiple conflicts.[86] Two of the most notorious mercenaries were involved in many African conflicts throughout the 1960s and 1970s. Today, mercenaries move from conflict to conflict in West Africa. The international reach of mercenaries and foreign fighters obviously poses challenges to control, given that merely restricting their movement to one area may not address the problem.

66. There is also the concern that mercenaries and foreign fighters may return home with superior military knowledge and skills. That concern is particularly worrisome with respect to foreign fighters, many of whom may initially not have known how to use weapons or may not have had experience in planning or coordinating attacks. There is some evidence that while very few foreign fighters return home to launch attacks, those who do are more likely to be successful because of their greater experience and training.[87] While mercenaries usually have military experience, they also may return to their home State with greater knowledge, especially in situations in which the military forces of the State in question may not be particularly skilled. Returning home with significantly improved skills may be problematic in States with weak governance.

67. The changing nature of war provides some explanation for the threats posed by foreign fighters and mercenaries. Before the nineteenth century, when the use of violence was commonplace, most people had experience in the use of weapons, those weapons were not of a highly technical nature, and the pool of mercenaries and fighters was skilled to begin with; their foreign adventures did not greatly augment the risk that they posed upon their return home. As the level of violence has declined, particularly in the developed world, most people no longer have direct experience of violence. Returning foreign fighters thus may well have developed skills beyond those of the general public — skills that the State has become poorly

[85] See Hussein Tahiri and Michele Grossman, "Community and radicalization: an examination of perceptions, ideas, beliefs and solutions throughout Australia" (Victoria Police and Victoria University, 2013).

[86] See Sarah Percy, "The changing character of private force", in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford University Press, 2011), p. 266.

[87] Thomas Hegghammer estimates that one in nine returning foreign fighters perpetrates attacks in the West but that those attacks are more likely to result in fatalities than those not perpetrated by returned foreign fighters. See Thomas Hegghammer, "Should I stay or should I go? Explaining variation in Western jihadists' choice between domestic and foreign fighting", *American Political Science Review*, vol. 107, No. 1 (2013), pp. 10 and 11. It is worth noting that that statistic predates the terror attacks carried out in Belgium in 2016 and in Paris in late 2015, both of which involved former foreign fighters. On Belgium, see https://www.theguardian.com/world/2016/mar/22/why-was-belgium-targeted-by-bombers; on Paris, see http://www.nato.int/docu/review/2015/ISIL/Paris-attacks-terrorism-intelligence-ISIS/EN/index.htm.

suited to control. Mercenaries and the employees of private military and security companies may fall into the same category.[88]

68. Distinguishing between mercenaries and foreign fighters on the basis of motivation makes historical sense. Nineteenth-century foreign enlistment legislation was concerned not with motivation, but with service abroad, because it centred on neutrality. Individual motivation did not matter as much as the prospect of an entanglement in an unwanted war. However, the prevailing concept of "mercenary" has always included a financial motivation.[89] Twentieth-century legal efforts focused considerably on that factor.[90]

69. There are notable practical difficulties, particularly legal difficulties, associated with characterizing actors on the basis of their motivations. First, motivations may be mixed. Soldiers of all types are paid; many national soldiers may be financially motivated, and foreign fighters are paid for their services under certain circumstances. Second, there are considerable evidentiary issues associated with relying on motivation as a defining characteristic. It is difficult to prove to the degree of certainty required by rights-compliant provisions of criminal law that a person has a particular motivation.[91]

70. Notwithstanding the practical and logical difficulties associated with the question of motivation, the historical record reveals that the differing motives of mercenaries and foreign fighters exert an influence on the following three points of difference between them: those for whom they fight; the types of conflict in which they are typically engaged; and the spreading of conflict in the areas where they may be fighting.

VII. Accountability and remedy for victims of human rights violations

71. All actors who use violence are accountable for their actions under international humanitarian law and international criminal law, regardless of their status. However, to the extent that mercenaries and foreign fighters use force outside the control of the sovereign State and, in particular, outside the relatively robust mechanisms for human rights protection in national military forces, they may be more likely both to violate human rights and to avoid punishment for doing so.

72. While both mercenaries and foreign fighters may commit and have committed human rights violations, in the case of mercenaries and private military contractors, employers can be put under pressure to prevent such behaviour. Market pressures against human rights violations have been repeatedly applied as useful non-legal

[88] The problem of learning how to perpetrate violence abroad and bringing it home is not necessarily restricted to foreign fighters. The assailants in the police shootings in both Baton Rouge, Louisiana, and Dallas, Texas, in 2016 were former military personnel. See https://theconversation.com/dallas-and-baton-rouge-shooters-a-reminder-of-the-troubled-history-of-black-veterans-in-america-62461.

[89] See Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford University Press, 2007).

[90] Both article 47 and the Convention identify financial motivation as a key characteristic of a mercenary.

[91] See Lord Diplock, Derek Walker-Smith and Geoffrey de Freitas, "Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries" (London, Stationery Office, 1976).

tools for controlling the private use of force.[92] In the case of private military and security companies, international mechanisms such as the Montreux process[93] and the International Code of Conduct for Private Security Service Providers[94] seek to apply additional measures that will promote lawful behaviour.

73. Unfortunately, market pressures and additional legal mechanisms are not as effective in regulating the behaviour of foreign fighters. This is particularly the case with respect to ISIL, an organization that has used gross violations of human rights as a propaganda tool, releasing videos of the most horrific violence.[95] Market and reputational costs of human rights abuses do not apply in such cases.

74. Indeed, foreign fighters may be especially prone to committing human rights violations because they are detached from the communities in which they fight. Historically, scholars such as Rousseau and Voltaire feared that foreign mercenaries would be used to repress communities because local people would be less likely to do so.[96] A parallel might be found with foreign fighters. However, it is also significant that organizations such as ISIL seem to have no difficulty in recruiting and radicalizing local people as well as foreigners.

VIII. Impact on the right of peoples to self-determination

75. In addition to having general human rights impacts, both mercenaries and foreign fighters can exert specific influence on national self-determination. The Working Group, as its title indicates, has noted the impact of mercenaries on the exercise of the right of peoples to self-determination, as have the Security Council and the General Assembly.[97] During the decolonization period, mercenaries were used primarily by those seeking to subvert newly decolonized States, and the link with self-determination has been reasonably clear.

76. Foreign fighters often fight for national self-determination or a specific political vision of the State. As noted above, they may fight for insurgent and revolutionary groups. Foreign fighters may subvert or support self-determination. The specific question of national self-determination, however, may be less important than the fact that in some cases the international community or significant portions thereof may support foreign fighters in their efforts to overthrow sovereign States. There are scenarios in which foreign fighters could play an important role in overthrowing tyrannical regimes. In fact, it is for that reason that the neutrality legislation discussed above was so difficult to operationalize.

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[92] See Deborah Avant, "The emerging market and problems of regulation", in *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, ed. Simon Chesterman and Chia Lehnardt (Oxford University Press, 2007), pp. 187-194.

[93] See http://www.mdforum.ch/.

[94] See http://icoca.ch/.

[95] See https://www.theguardian.com/world/2015/feb/08/isis-islamic-state-ideology-sharia-syria-iraq-jordan-pilot.

[96] See Sarah Percy, "Morality and regulation", in *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, ed. Simon Chesterman and Chia Lehnhardt (Oxford University Press, 2007), p. 19.

[97] In its resolution 31/34 (1976), the General Assembly reiterated that the practice of using mercenaries against movements for national liberation and independence constituted a criminal act.

IX. Conclusions and recommendations

77. There are significant similarities and differences between mercenaries and foreign fighters that can usefully inform any approach to their regulation. Significant differences are found in terms of recruitment, motivations and their implications both for the type of conflict engaged in and for regulations. Given the analysis of commonalities between mercenaries and foreign fighters with respect to recruitment, their impact on human rights and the right of peoples to self-determination, and the evolution of circumstances giving rise to their use, the Working Group reiterates its assertion that foreign fighters are a possible contemporary form of mercenarism or mercenary-related activities.

78. Both mercenaries and foreign fighters are actors who can carry out considerable violence both within and outside of State control. Accordingly, their activities should be closely monitored. However, the history of their activities and attempts to control them shows considerable differences.

79. The long and chequered history of international law regarding the use of mercenaries demonstrates the difficulty of criminalizing or attempting to penalize a type of actor in all scenarios. The precise definitions of a mercenary set out in article 47 of Additional Protocol I to the 1949 Geneva Conventions and in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries clearly delineate what a mercenary is, but in so doing perhaps create too many loopholes to enable legislation to be functional.

80. Attempts to control specific types of mercenary activity are also being considered in contrast to the regulation or prohibition of mercenaries per se. This was the approach that many Western States advocated throughout the process of drafting the Convention. Some of these activities, such as planning and conducting a coup, would already have been illegal. This approach would have required States and the international community to make sure that international law coincided and harmonized with domestic law.

81. The examination of domestic law dealing with foreign fighters reveals that there is no discernible trend towards creating a specific international regime that targets foreign fighters per se and few domestic attempts to do so. However, there are many more targeted efforts to control foreign fighters serving in particular areas or committing offences associated with terrorism. The effectiveness of the approach taken with respect to foreign fighters remains to be proved.

82. Another control option that has been applied to private military and security companies but would be less likely to be applicable to foreign fighters is the "soft law" approach taken in the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, which creates no new binding law but rather restates the obligations of international humanitarian law and underlines best practices, and in the International Code of Conduct for Private Security Service Providers. Those documents require that the signatories wish to be regulated and that market and reputational pressures be brought to bear in the absence of more formal international sanctions. As foreign fighters are unlikely to want to be regulated

and are less susceptible to market and reputational pressures, this approach could not succeed.

83. Accordingly, the creation of specific international regulations on foreign fighters would be challenging. In addition, there are situations in which the use of foreign fighters, if not desirable, may be an understandable response to tyranny. It is therefore unlikely that all States would be keen to restrict the use of foreign fighters in all circumstances.

84. Foreign fighters will continue to pose serious security threats, in terms of both prolonging wars and possibly returning home radicalized and with new military knowledge. Foreign fighters are currently being employed by actors who have no interest in international peace and stability and no negotiable aims, meaning that peaceful resolutions to the conflicts in which they fight are unlikely.

85. The context of armed conflict in which many foreign fighters operate triggers the application of international humanitarian law and international human rights law as a framework for accountability and remedy for victims. Beyond this, experience with the narrow definition set out in the Convention provides guidance towards a legal regime, or revised legal regime, that reflects the evolving nature of the phenomenon of individuals who are paid to go abroad to fight and commit human rights violations. Such a regime must be cognizant of the human rights challenges of restricting travel across borders and must seek to address motivations and root causes, as well as ensure accountability and remedy for human rights violations. At the same time, it must not be so overbroad as to be open to abuse in the name of countering terrorism.

86. The Working Group thus commends the proposed comprehensive studies by United Nations and civil society entities to assess those States that have created legislation dealing with foreign fighters in response to Security Council resolution 2178 (2014). It also recommends a comparative analysis of all domestic legislation relating to foreign fighters. Establishing whether and how States are responding to resolution 2178 (2014) is a necessary first step in allowing for better international coordination of domestic efforts to address the matter. For that purpose, it must be recalled that resolution 2178 (2014) concerns "foreign terrorist fighters", not foreign fighters per se.

87. The Working Group urges United Nations Member States to ensure that domestic legislation to address foreign fighters is compliant with international human rights law. It also encourages international cooperation in the form of mutual legal assistance and extradition agreements to better facilitate the evidence-gathering and prosecution required to secure greater accountability for the human rights violations committed by foreign fighters.

Annex

Definitions of a mercenary

In article 47 of Additional Protocol I to the 1949 Geneva Conventions (1977)

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Does, in fact, take a direct part in the hostilities;

(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

(d) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(e) Is not a member of the armed forces of a party to the conflict; and

(f) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

In the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989)

3. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict; and

(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

4. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.